

IN THE COURT OF CRIMINAL APPEALS

FOR THE STATE OF TEXAS

EX PARTE

NO. WR-75,828-02

PAUL DAVID STOREY

ALTERNATIVE SUGGESTION FOR RECONSIDERATION
ON THE COURT'S OWN INITIATIVE

TO THE HONORABLE JUDGES OF THE COURT OF CRIMINAL APPEALS:

COMES NOW, Michael Ware and Keith S. Hampton, attorneys for Applicant in the above-entitled cause, and would show the Court the following:

Counsel has prepared Applicant's *Suggestion for Reconsideration on the Court's own Initiative*, filed simultaneously with this *Alternative Suggestion*. The *Suggestion* addresses the propriety of dismissing Applicant's *Subsequent Application for Writ of Habeas Corpus* on the grounds that initial habeas counsel lacked diligence. As counsel was preparing its *Suggestion*, counsel sought to cite to the clerk's records reflecting Applicant's extensive arguments made to the trial court that are crucial to this Court's decision to dismiss Applicant's subsequent writ application. Counsel was perplexed to see that the array of equitable considerations that had been urged were nowhere mentioned in any of the opinions.

Counsel checked the Tarrant County District Clerk's file. Applicant's *Request for Affirmative Finding That Robert Ford Exercised Due Diligence in His*

Representation of Applicant was filed on August 9, 2017, as noted by the district court. Applicant's *Motion to Preclude the State from Contending That Counsel Failed to Exercise Due Diligence In Ascertaining the Cherrys' Opposition to Paul David Storey's Execution* was filed on September 11, 2017.

Counsel has now reviewed the record transmitted to this Court from the Tarrant County District Clerk. Neither Applicant's *Motion* or *Request* ever reached this Court. Both contain arguments central to this Court's disposition of this death penalty subsequent writ application.

All of the State's written arguments were sent to this Court. None of Applicant's written arguments were sent to this Court. The significance of these documents can be measured by the State's response; it devoted its entire finale exclusively to arguments against Applicant's due diligence claims. (Clerk's 6th Supp. R. pp. 22-26).

This Court's action under these circumstances will reflect its value on trial court proceedings and the estimation of trial courts, including those self evidently better informed than this Court. Judge Everett Young's recommendations are made on more considerations than those available to this Court. (Clerk's 5th Supp. R. pp. 15-17). This Court should at least have the whole record and all the arguments before dismissing a trial court's findings, conclusions and recommendations.

Counsel for Applicant established “sufficient specific facts” “not ascertainable through the exercise of reasonable diligence[.]” Tex. Code Crim. Pro art. 11.071, §§5 (a)(1) & (e). Counsel established facts that persuaded the district court to preclude anything contrary to those facts, including inferences, on equitable grounds as argued in written documents this Court never considered. Consequently, the trial court’s findings and conclusions are not only established by the record, but uncontradicted. This Court should therefore consider them as determinative of the issue because this Court is precluded from relying on the per curiam’s selective fact as a matter of law.

This Court got a one-sided presentation of argument. This Court considered the State’s argument. But it did not consider Applicant’s written motion and request with arguments made to the trial court because this Court never got either the motion or request.

Counsel respectfully suggests that this Court withdraw its opinions, order the district clerk to transmit the rest of the record to this Court immediately, reconsider the case in light of a full record as well as considerations in Counsel’s *Suggestion*, and in its discretion, order the relief sought in Applicant’s *Subsequent Writ Application*, or order Applicant and State to brief the issues that concern this Court in this case.

Respectfully submitted,



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CERTIFICATE OF SERVICE: By my signature below, I certify I have served a true and correct copy of the foregoing pleading upon counsel for the State, Attorney Pro Tem Travis Bragg, at Travis.Bragg@oag.texas.gov on October 16, 2019.

